NO. 82-1820

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAROL DUERR,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

On Writ of Certiorari to the Court
of Appeals for the First Appellate District
Hamilton County, Ohio

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

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QUESTIONS PRESENTED

I. WHETHER A CONFESSION TO A MURDER CONSPIRACY IS CONSTITUTIONALLY ADMISSIBLE UNDER THE FIFTH AND FOURTEENTH AMENDMENTS WHERE IT IS THE RESULT OF THE COALESCENCE OF MANY FACTORS WHICH RENDERED IT INVOLUNTARY: THE PROLONGED DETENTION OF PETITIONER; HER ILLNESS, LACK OF SLEEP, LACK OF NOURISHMENT, HER UNFAMILIARITY WITH THE CRIMINAL JUSTICE SYSTEM AND THE LEADING, EVEN ORCHESTRATION OF HER STATEMENT BY THE INTERROGATING OFFICER.

II. WHETHER AN ATTORNEY MAY INVOKE THE PRIVILEGE AGAINST SELF-INCRIMINATION ON BEHALF OF HIS CLIENT BY TELEPHONICALLY CONTACTING THE POLICE STATION DURING HER STATEMENT AND DEMANDING THAT FURTHER QUESTIONING CEASE.

PLEASE NOTE: All parties to the within action are named in the caption. A companion case, Catherine Duerr v. Ohio, is being separately filed on behalf of Petitioner's daughter, who is indigent.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

PETITION

Petitioner, Carol Duerr, respectfully petitions the Court for a writ of certiorari to review the judgment and decision of the Court of Appeals for the First Appellate District, Hamilton County, Ohio, affirming her conviction for the crime of aggravated murder.

OPINIONS BELOW

The judgment of the Court of Appeals for the First Appellate District of Ohio, rendered November 17, 1982, is unreported and appears as Appendix A to this Petition, *post.* at p. 1a. The decision of the Ohio Supreme Court refusing review of this case on March 9, 1983, is appended hereto as Appendix B.

JURISDICTION

The final order of the Supreme Court of Ohio denying review herein was rendered March 9, 1983. This Petition is timely filed and jurisdiction is founded on 28 U.S.C. 1257 (3), Petitioner having asserted below and in this Court a denial of rights secured to her by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

> No person . . . shall be compelled in a criminal case to be a witness against himself, . . .

SIXTH AMENDMENT, UNITED STATES CONSTITUTION:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

FOURTEENTH AMENDMENT, UNITED STATES CONSTITUTION:

> Section 1. . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law.

OHIO RULES AND STATUTES:

OHIO RULES OF EVIDENCE, RULE 801 (D) (2) (e)

> (D) *Statements which are not hearsay.* A statement is not hearsay if . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

OHIO REVISED CODE:
Section 2903.01 *Aggravated murder.*

> (A) No person shall purposely, and with prior calculation and design, cause the death of another.

STATEMENT OF THE CASE

Petitioner, Carol Duerr and her daughter, Catherine Duerr, were indicted and convicted, along with Dennis Goerler, of the aggravated murder of Raymond Duerr in the Court of Common Pleas of Hamilton County, Ohio. Their convictions were affirmed by the Court of Appeals for the First Appellate District. The Ohio Supreme Court declined to review the case on March 9, 1983.

* * *

On May 19, 1981, Raymond Duerr, an engineer for the Cincinnati Gas & Electric Co., was discovered dead on the

floor of the bedroom he shared with his wife, Petitioner, in their home in Anderson Township, a suburb outside of the City of Cincinnati. Mr. Duerr's body was discovered by his wife at approximately 8:00 P.M., after she, her daughter Catherine, and Catherine's boyfriend, Dennis Goerler, had returned to the residence after shopping and visiting Petitioner's parents. The police and life squad responded, and Petitioner and Catherine were briefly interviewed by police that night.

The following day, W. Stewart Mathews, II, a Cincinnati, attorney, contacted the Sheriff's office on behalf of Petitioner, his client, with respect to securing the return of Mr. Duerr's checkbook and other personal items taken by the police and/or life squad members when Mr. Duerr's body was removed. An appointment was made for Petitioner to report to the Hamilton County Sheriff's headquarters at 6:00 P.M. that evening.

Petitioner, Catherine and Goerler appeared at police headquarters as scheduled, having first dropped the Duerrs' other daughter, Mary Beth, off at her apartment in Fairfield. The two women and Goerler arrived at police headquarters at 6:00 P.M. on May 20, and at 7:00 P.M. Petitioner was interviewed until 8:45 P.M. Thereafter, Goerler was taken back, followed by Catherine. Both Goerler and Catherine gave statements in the early morning hours which implicated themselves and Petitioner in the slaying of Mr. Duerr. Petitioner was again taken back for questioning, and made a taped statement at 7:20 A.M., concluding at 8:10 A.M. The statements of all three were introduced against them by the state in each of their separate trials.

During Petitioner's statement, between 7:20 and 8:10 A.M., according to the defense, Petitioner's attorney, alerted

by Mary Beth Duerr that her mother and sister had been at police headquarters all night, called headquarters, and demanded that no statements be taken and that any interogation cease. Mathews maintained that he called shortly after 7:45, when Petitioner's statement was being taken; Captain Henke of the Sheriff's office, admitted taking the call, but indicated that the statements had been concluded at the time Mathews called.

The three were jointly indicted for the aggravated murder of Mr. Duerr. A bill of particulars filed by the state alleged that Goerler was the triggerman, and was alone in the house when Mr. Duerr was shot; the two women were alleged to have been co-conspirators with Goerler, but were charged as principals.

Prior to trial, all three defendants had a joint hearing on motions to suppress statements filed by all three. The trial court denied the motions to suppress, which were principally based upon the prolonged detention, lack of sleep, meals and medicine, and illness suffered by the respective defendants, and the Duerrs had further alleged that they were denied the right to counsel as well.

During the two separate trials of Petitioner and her daughter, the prosecution introduced the statements despite the fact that there had been no testimony concerning the cause of death of the victim, over objection by the defense that the *corpus delecti* had not yet been established, as is required by Ohio law. Statements by the codefendants were also admitted over objection, the trial court in each instance ruling that the statement by Petitioner constituted "independent" evidence of the conspiracy so as to justify the admission of such statements.

REASONS FOR GRANTING THE WRIT

I. THE CONFESSION ADMITTED AGAINST PETITIONER WAS EXTRACTED IN VIOLATION OF HER PRIVILEGE AGAINST SELF INCRIMINATION SECURED TO HER BY THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT WAS THE PRODUCT OF A COALESCENCE OF PRACTICALLY EVERY FACTOR PREVIOUSLY CONDEMNED BY THIS COURT AS UNDULY CONTRIBUTING TO THE MAKING OF AN INVOLUNTARY CONFESSION.

When Petitioner, her daughter, and Goerler appeared at Sheriff's headquarters at 6:00 P.M. on the day after her husband's murder, Petitioner had had almost no sleep for two days; her confession was begun at 7:20 A.M.; she had had nothing to eat but one half of a cold, greasy hamburger; she was ill; she was led through her statement as it was committed to the tape recorder; and Petitioner was totally unfamiliar with the criminal justice system.

The test of the admissibility of a confession is whether it is voluntary, not whether it is true or false, *Spano* v. *New York,* 360 U.S. 315 (1959). The Fifth Amendment privilege against self incrimination is binding on the states through the due process clause of the Fourteenth Amendment, *Malloy* v. *Hogan,* 378 U.S. 1 (1964).

The test of voluntariness, in turn, is whether the behavior of law enforcement, in conjunction with the other facts and circumstances surrounding the giving of the statement, was such as to overbear the will to resist and to bring about confessions not freely self-determined. *Rog-*

ers v. *Richmond,* 365 U.S. 534 (1961). Through the years, this Court has condemned several factors which have given rise to involuntary confessions. Most of those factors are present in this case, and it is the coalescence of these factors which constitutes the basis for this constitutional claim.

1. **Prolonged detention.** Petitioner was at the police station from 6:00 P.M. on May 20, 1981 continuously until 7:20 A.M. on May 21, when her taped statement commenced, approximately thirteen hours after her arrival at headquarters. This Court has decided many cases where prolonged detention prior to the giving of a confession was condemned as a contributing factor in an involuntary confession: *Spano* v. *New York, supra*; *Culombe* v. *Connecticut,* 367 U.S. 568 (1961) [12 hour detention]; *Chambers* v. *Florida,* 309 U.S. 227 (1940). Ironically, in *Chambers,* the accused also was held from the afternoon of May 20 to the early morning hours of May 21, and the result was the same as here: an involuntary "sunrise" confession.

2. **Lack of nourishment.** Petitioner had only half a greasy hamburger to eat while she was at police headquarters for thirteen hours. Lack of nourishment has also been recognized by the Court as a factor contributing to involuntary confessions, *Watts* v. *Indiana,* 338 U.S. 49 (1949), *Payne* v. *Arkansas,* 356 U.S. 560 (1957), *Reck* v. *Pate,* 367 U.S. 433 (1961).

3. **Lack of Sleep.** Lack of sleep has often been cited by the Court as another factor in the making of involuntary confessions, *Watts* v. *Indiana, supra,* where the Court held that disregard for the rudimentary needs of life, opportunities for sleep and a decent allowance of food, are relevant, not as aggravating elements of the suspect's treat-

ment, "but as part of the total situation out of which his confessions came and which stamped their character," 338 U.S. at 53. See also *Chambers* v. *Florida, supra, Leyra* v. *Denno,* 347 U.S. 556 (1953). Lack of sleep and the fatigue resulting therefrom was the basis for the Court's holding a confession involuntary in *Ashcraft* v. *Tennessee,* 322 U.S. 143 (1944). The lack of sleep is perhaps the most significant factor in the weakening of one's resistance and resolve. Its effects are both physical and mental and contributed significantly to the decision of Petitioner to make the statement which ultimately resulted in her conviction and life sentence.

4. Illness of the Suspect. Physical and mental illness also is a significant factor in the determination of the voluntariness of confessions, *Reck* v. *Pate, supra.* It is uncontradicted that Petitioner was ill on the night of her interrogation, suffering from stomach and kidney ailments (R. 300-301); the detective assigned to "chaperone" Petitioner confirmed that Petitioner complained of illness, fatigue and hunger, and that she used the bathroom quite frequently (R. 421, 427-8).

5. Leading question and answer statement. Petitioner's statement was basically a series of responses to factual allegations supplied by the interrogating officer. Such a statement has been condemned by this Court as a hallmark of an involuntary statement, *Spano* v. *New York, supra, Fikes* v. *Alabama,* 352 U.S. 191 (1957).

All of these factors are present to some degree in this case. Petitioner's statement was the involuntary product of the coalescence of these factors. Illness, fatigue, unfamiliarity with the ways of crime and its detection, a statement of responses rather than volunteered facts — all are present here and all establish the involuntariness and un-

constitutionality of Petitioner's confession. It was secured from and used against her in violation of the privilege against self incrimination and the due process clause. Her conviction should be reviewed and reversed.

II. IT IS IMPORTANT THAT THE COURT DECIDE WHETHER AN ATTORNEY MAY INVOKE THE PRIVILEGE AGAINST SELF INCRIMINATION ON BEHALF OF HIS CLIENT WHO IS, AT THE TIME OF THE INVOCATION OF THE PRIVILEGE, THEN BEING INTERROGATED BY POLICE.

Petitioner Carol Duerr had contacted Cincinnati attorney W. Stewart Mathews II shortly after Mr. Duerr was killed, and on the next day, May 20, Mr. Mathews had spoken with several Sheriff's deputies indicating that he represented Mrs. Duerr. He arranged for Petitioner to present herself at headquarters at 6:00 P.M. that evening to secure the return of Mr. Duerr's checkbook and other personal belongings. Of course, when she left headquarters she was in custody, having given a statement and having been charged with the aggravated murder of her husband.

This issue is presented because Mr. Mathews maintained that he had called headquarters at approximately 7:45 A.M., during the taking of Petitioner's statement (from 7:20 to 8:10) and demanded that questioning cease. Captain Henke told Mathews that the statements had already been taken, and stated that he would give Petitioner a message to call Mr. Mathews. Henke maintained that, when Mathews called, the statements had indeed been completed. The Court of Appeals accepted the trial court's

assessment of credibility in favor of Henke and ruled that there was no constitutional issue presented.

While it is true that the issue claimed by Petitioner here turns on a question of credibility, we contend that the credibility question should have been resolved in favor of Petitioner and against the prosecution. Appellate courts can, should, and do, assess credibility of witnesses on occasion, *Tibbs* v. *Florida* (1982), —— U.S. ——, 102 S.Ct. 2211.

The reason that Petitioner's contention is correct is that Henke indicated that he did give her the message to call Mr. Mathews, and the evidence shows that she did call Mathews after her statement was concluded, after being advised by Captain Henke to call her attorney. The state's only witness at the motion to suppress, Detective Bennett, testified that he saw Petitioner on the phone with Mr. Mathews, and spoke with Mr. Mathews himself. He testified that the call was made "a very few minutes" after her statement was concluded at 8:10 A.M. (R.M. 343). Consequently, it is impossible for Henke to have taken the call from Mathews after the statement was concluded, then told Petitioner to call her attorney, and after she had been photographed and fingerprinted, for her to then make the call within "a *very* few minutes of her statement, as Bennett confirmed.

Of course, when an attorney representing a suspect demands that questioning cease, a constitutional problem under *Escobedo* v. *Illinois*, 373 U.S. 478 (1964), presents itself. The Court of Appeals did not reach this question, resolving the factual dispute against Petitioner. [We should add at this point that Petitioner and her daughter both testified that they demanded counsel prior to the making of their statements, and that they were denied the right

to consult with counsel. The police denied that such a demand was made; of course, the courts below resolved this conflict against appellants as well.]

The only reasonable construction of Bennett's testimony is that Mathews necessarily had to have called during the taking of Petitioner's taped statement. It further appears that the police claim that they believed that Mathews represented Petitioner only with respect to her husband's estate is incredulous. A person who consulted an attorney to secure the return of miscellaneous personal items from police was not believed by them to have intended to consult an attorney when accused of aggravated murder, and they further denied that she asked for counsel even when she became aware of the seriousness of her predicament. Certainly the sum of human experience teaches that one who has retained an attorney for a minor matter would, and did, insist on consulting that attorney when she learned but a day later that she was accused of aggravated murder, the most serious crime since the dawn of civilization.

The right to counsel is a principal guarantee against the overreaching of police in the gathering of confessions. One who consults with counsel can more reliably determine whether his interests will best be served by cooperating and discussing the offense with law enforcement authorities. Certainly, one's attorney, whose sole task is to speak for and to represent his client, should be permitted to invoke the privilege against self-incrimination on behalf of his client; Petitioner's attorney made such an attempt here, and the only rational interpretation of the facts compels the conclusion that he called the police and demanded that questioning cease while the statement of Petitioner was even then being obtained. As it is impossible to determine

exactly at what point in the statement the attorney called, then the entire statement should be ruled inadmissible.

Petitioner's statement was extracted from her in violation of her right to counsel secured to her by the Sixth and Fourteenth Amendments and its use against her at her trial is grossly unconstitutional.

CONCLUSION

In a few brief pages, we have enumerated the several constitutionally infirm factors which coalesced to render Petitioner's statement involuntary, and thus constitutionally inadmissible. Each of the several factors has been condemned by this Court in prior cases; yet in no one of those great cases were so many of such factors present as are present here. The brief listing of the factors and of the cases in which this Court has condemned their presence cannot adequately convey the effect of the *combination* of those factors on Petitioner and on the decision to waive her right to silence and to counsel and to give a statement. The significant aspect of this case is the coalescence of so many of the condemned factors, each interacting with and reinforcing the others, with the conclusion rendered inescapable that the combination of these factors, the "totality of the circumstances," resulted in an involuntary confession being extracted from Petitioner. Clearly the denial of the motion to suppress such statement is constitutional error of the first magnitude.

As to whether Petitioner waived the right to confer with counsel, Petitioner denied below and denies here that she waived the right to counsel. But we must concede that the trial court and the Court of Appeals resolved the credibility question against Petitioner; nevertheless, the factors

cited as having combined to produce an involuntary confession also combined to produce an involuntary waiver of the right to counsel as well, even if the incredible version of law enforcement in this case is to be fully credited. The Court is respectfully urged to review this case, to reverse the judgment below, and to remand with instructions to provide Petitioner with a new trial at which her tape recorded confession and any and all oral statements leading up to it are not used in evidence against her.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-810761

STATE OF OHIO,

Plaintiff-Appellee,

vs.

CAROL DUERR,

Defendant-Appellant.

OPINION

(Filed November 17, 1982)

**APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO**

Messrs. Simon L. Leis, Jr., William E. Breyer, Arthur M. Ney and R. Thomas Moorhead, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Messrs. Wm. Stewart Mathews, II and James M. Rueger, 1300 American Building, 30 East Central Parkway, Cin-

cinnati, Ohio 45202, and Mr. H. Fred Hoefle, 1010 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, P.J.

The defendant-appellant was indicted on a charge of aggravated murder of her husband, Raymond Duerr. Indicted with her on the same charge were her daughter, Catherine Duerr, and Dennis Goerler. Separate trials were requested and granted. In due course, an evidentiary hearing was held on the defendant's motion to suppress, heard by stipulation along with similar motions by the other two defendants, and the motion was overruled. The matter then proceeded to trial by jury, at the conclusion of which the defendant was found guilty as charged and was sentenced as appears of record. Appeal was timely filed, with three assignments of error raised for review, considered here in the order of presentation.

For her first assignment of error, the defendant asserts that the trial court erred in denying her motion to suppress an inculpatory statement said to have been involuntarily given and to have been extracted in the absence of appellant's attorney. This assignment of error may be said to proceed in two parts: first, defendant argues that the length of time she spent at police headquarters, her state of health, both mental and physical, and the circumstances of her ultimate confrontation by police after they had first secured inculpatory statements from Catherine Duerr and Dennis Goerler, all combine to deprive the statement she made to police of its voluntary and knowing nature, requiring — it is argued — its suppression. Second, the defendant argues that the statement was taken from her after she requested and was denied the assistance

of counsel, and, in any event, after the police were aware of the fact that she was represented and that her counsel was attempting to reach her. For the reasons hereinafter set forth, we find neither argument to possess merit.

As to the first argument under this assignment of error, we simply find nothing in the record which would compel or require the conclusion of the trier of fact that the statement was taken under circumstances which, by virtue of their coercive, unduly suggestive, or other improper nature, deprived defendant's statement of its voluntary character. The defendant points, in support of her thesis, to her prolonged detention, her inexperience with the criminal justice system, her argued lack of nourishment and sleep, and her asserted physical illness, together with what is urged to have been the suggestive nature of the interrogation.[1] Yet the record convincingly demonstrates that from the time defendant arrived at the police station until she was actually implicated in the crime, she was under no suspicion of complicity and under no restraints.

Thus, defendant and her two companions arrived at police headquarters at 6:00 p.m. on May 20, 1981. They were seated in a general lounge area until the defendant was called for an interview that lasted from 7:00 to 8:45 p.m. After the interview, defendant returned to the lounge area and remained there until Dennis Goerler and Catherine Duerr implicated her during the early morning hours of the 21st. During this period, she made and received a number of telephone calls, left the station unaccompanied

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[1] We refer to the companion case of *State* v. *Goerler*, No. C-810778, released this day, for a recital of the sequence of events that marked the questioning and interrogation of the parties on the evening of May 20th and early morning hours of May 21st, as well as the events preceding this period of questioning.

to purchase medicine for Goerler, went to the restroom several times, was served food by the police, and spent most of the balance of the time in the lounge area of the station with immediate access to the outside. Not until first Goerler and then the defendant's daughter actually implicated the defendant did what may be called a custodial interrogation commence, at about 6:30 a.m. It was at this time that the defendant was advised of her constitutional rights, and at about 7:20 a.m. that she made the inculpatory statement in question. We conclude that, under the totality of circumstances, the trial court had before it ample credible evidence from which to conclude that the statement at issue was made voluntarily and knowingly. *State* v. *Edwards* (1976), 49 Ohio St. 2d 31, 358 N.E.2d 1051, *vacated on other grounds* (1978), 438 U.S. 911, 98 S. Ct. 3147.

The second argument under the first assignment of error deals with whether or not defendant's constitutional right to counsel was violated. This argument consists of two points: first, the defendant claims she asked for the assistance of counsel during the interrogation process and was told she did not need it. This was flatly denied by the officers involved in the questioning. Some independent confirmation of the police position is supplied by the numerous telephone calls made by the defendant during the evening, none of which were to the counsel with whom she had conferred about estate matters earlier in the day, and who represented her interests.[2] In any event, a clear

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[2] It seems clear that the police were aware that defendant's counsel, William Stewart Mathews II, represented her in her presumed capacity as administratrix of hr husband's estate, since Mathews had contacted the Sheriff's office during business hours on the 20th to inquire about the return of personal property of the deceased held by that office or the coroner. It is not contended that the authorities knew

question of credibility was presented to the court, which it resolved against the defendant. We know of no reason why it was not within the power of the court to do so. *State* v. *DeHass* (1967), 10 Ohio St. 2d 230, 227 N.E. 2d 212.

The second aspect of this argument concerns a telephone call to the station made sometime on the morning of May 21st by the defendant's attorney. It is agreed that such a call was made and received, and that the attorney was told that interrogation of the defendant had already ceased because her statement had been completed. It is further agreed that the defendant's statement was completed at about 8:10 a.m. The problem arises from testimony adduced on behalf of the defendant that the call was made to the station shortly after 7:45 a.m., which would obviously have been before the statement had been completed and would, if accurate, raise the constitutional problem addressed in *Escobedo* v. *Illinois* (1964), 373 U.S. 478, 84 S. Ct. 1758, and *Edwards* v. *Arizona* (1981), 451 U.S. 477, 101 S. Ct. 1880. *See also State* v. *Burt*, C-790438 (1st Dist. May 14, 1980). An issue of fact was, however, presented to the trial court as to when this call was actually made. The officer who received the attorney's call, Captain Henke, the supervising officer in the investigation, testified quite positively that it was not made until *after* the defendant's statement had been completed, T.p. 172, which would necessarily place the call after 8:10 a.m.

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then that Mathews was to represent her in criminal charges, or that Mathews had instructed them not to question her; indeed, at that time the defendant was not under suspicion, and no reason for such precautions could have arisen. It was not until an early morning call to Mathews by the defendant's daughter, Mary Beth, that he was aware of his client's possible jeopardy on criminal charges.

The defendant argues that we are able to, and should, find the trial court's adverse resolution of this factual dispute to be contrary to the manifest weight of the evidence. This would require, obviously, that we discount Captain Henke's testimony on the timing of the call, and accept in its most favorable light that of Mathews, the defendant's attorney. He testified that he had received the call from Mary Beth Duerr alerting him that the defendant had been at the station all night at "approximately" 7:45 a.m. and that, after completing this call, he "immediately" called the station and spoke to Henke. T.p. 261, 262. It would also require that we discount the thrust of his testimony that the defendant returned his call at "approximately 8:10 or 8:15 a.m.," *after* she had finished her statement and the subsequent fingerprinting and photographing. T.p. 262, 267, 268. We find no justification, under these circumstances, for substituting our judgment on the issue for that of the trier of facts, and decline to do so.

The first assignment of error is accordingly overruled.

The defendant's second assignment of error argues that the trial court erred in overruling her objection to the introduction of her inculpatory statement into evidence where, it is insisted, there had been insufficient evidence of the *corpus delicti* first established. While the rule urged by the defendant, *viz.*, that some evidence of the death of the victim, and a criminal agency as the cause of that death, must precede the introduction of a confession by the defendant, is a correct one, *State* v. *Maranda* (1916), 94 Ohio St. 364, 114 N.E. 1038, it is equally clear that:

> The quantum or weight of such additional or extraneous evidence is not of itself required to be equal to proof beyond a reasonable doubt, nor even enough to make a *prima facie* case.

State v. *Edwards* (1976), 49 Ohio St. 2d 31, 358 N.E.2d 1051, syllabus 1c. As noted by Chief Justice O'Neill in *Edwards, supra* at 35-36, 358 N.E.2d at 1056.

> Considering the revolution in criminal law of the 1960s and the vast number of procedural safeguards protecting the due process rights of criminal defendants, the *corpus delicti* rule is supported by few practical or social-policy considerations. This court sees little reason to apply the rule with a dogmatic vengeance.
>
> In considering the minimal requirements of *Maranda* and in evaluating the evidence in the light of the ordinary customs of our times, we conclude that the prosecution did produce *some* evidence tending to corroborate the material elements (of the crime).

See also State v. *Black* (1978), 54 Ohio St. 304, 376 N.E. 2d 948. Here, the record reveals that substantially more than "some" evidence of the *corpus delicti* preceded the introduction of the inculpatory statement of the defendant. The first witness, a co-worker of the deceased, testified that Mr. Duerr was alive at shortly after 5:00 p.m. on May 19, having spoken to him about then. He further testified that he was told by the defendant the following morning that Mr. Duerr had been shot the preceding evening. He then verified photographic exhibits, subsequently received into evidence, one of which was a morgue photograph of the deceased clearly showing the bullet wound in the deceased's head. The second and third witnesses, neighbors of the Duerr's testified that on the evening of the 19th, the defendant told them that her husband had been shot. The second witness testified that the defendant told him she thought her husband was dead. The fourth witness, a paramedic, examined the body, found no respiration or heartbeat, and then described the

trauma to the head of the deceased. The sixth witness, Lt. Hulgin, examined the scene at 9:45 p.m. on the 19th, and described finding decedent's blood stained wearing apparel on the stairway, other blood stains on the bathroom doorjamb, a spent cartridge casing lying on the floor, and the body of the deceased in his bedroom. He further testified that he found a bullet hole in the bedroom wall, and blood on the blanket on the bed along with another spent cartridge casing. All of the foregoing testimony preceded the introduction of the statement of the defendant and was ample, we conclude, to establish the *corpus delicti* under the *Edwards* and *Black* rationale. *State* v. *Latscha*, C-800844 (1st Dist. Nov. 18, 1981). The second assignment of error is without merit and is overruled.

The third assignment of error is phrased as follows:

> The trial court erred to the substantial prejudice of the defendant-appellant by admitting into evidence statements of alleged co-conspirators without first establishing the conspiracy by independent proof, or were [*sic*] not made infurtherance of the conspiracy.

The reference in this assignment to "statements of alleged co-conspirators," it must be understood, does *not* refer to the formal taped confessions of Dennis Goerler and Catherine Duerr. Their confessions implicated the defendant in a conspiracy of the three to kill Raymond Duerr, and were taken during the early morning hours of May 21st. Both confessions preceded (and caused) the custodial interrogation of the defendant, resulting in her inculpatory statement, which ended at 8:10 a.m. These taped confessions of Goerler and Catherine Duerr were never offered or received into evidence, although referred to in passing, from time to time, primarily to establish the change in status of the defendant from mere witness to prime suspect,

requiring as to her the full panoply of constitutional instructions. Rather, the assignment of error must be held to refer to various statements made to witnesses by Goerler or Catherine Duerr, or actions taken by both, but principally Goerler, generally prior to the homicide. These statements, too lengthy to set out in detail herein but which are explored on pp. 39-42 of the appellant's brief, were introduced into evidence *after* the court received into evidence the confession of the defendant. The defendant's position may fairly be summarized by the following statement of her argument:

> However, in the case at hand, the Court allowed statements made by alleged co-conspirators before a conspiracy had been established, before any independent proof had been offered concerning said conspiracy, and from a review of the record, it can be seen that the only evidence that a conspiracy ever existed or that the alleged co-conspirators and Defendant-appellant were involved, *was the hearsay statement of Defendant-Appellant,* which was admitted in the State's case in chief *and which is not independent proof required by the Rule and the case law previously cited* (emphasis added).

Appellant's Brief, pp. 38-39.

The "Rule" to which reference was made in the quotation above, and upon whose interpretation this aspect of the issue raised in the third assignment of error depends, is Evid. R. 801 (D) (2) (e), which provides:

> (D) *Statements Which Are not Hearsay.* A statement is not hearsay if: . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy *upon independent proof of the conspiracy* (emphasis added).

Unless the inculpatory statement[3] of the defendant may be said to constitute "independent proof" of the conspiracy, the defendant is quite correct that the statements of the co-conspirators would not fall within Evid. R. 801 (D) (2) (e) and would thus be inadmissible hearsay, since no other proof of the conspiracy exists in the record. We simply disagree with the defendant that the statement of the defendant, which concededly gave substance to the charge of a conspiracy of the three, was not such "independent proof" of the conspiracy as would satisfy the requirements of the rule.

Thus, while the point appears to be one of first impression in Ohio, we are instructed by a variety of decisions interpreting the federal analogue of the Ohio rule, Fed. R. Evid. 801 (d) (2) (E). It will be noted that while the federal rule does not contain an explicit requirement that there be independent proof of the conspiracy, as found in the Ohio rule, the requirement of independent proof has nevertheless been engrafted onto the federal rule by case law interpreting the section. These cases follow the reasoning in *Glasser* v. *United States* (1941), 315 U.S. 60, 74, 75, 62 S. Ct. 457, 467, that without proof *aliunde* of the conspiracy, "hearsay would lift itself by its own boot straps to the level of competent evidence." One statement of the rule was made in the following fashion:

> Cambindo argues that the court admitted hearsay evidence that did not fall under the coconspirator exception to the hearsay rule, Fed. R. Evid. 801 (d) (2) (E), in that certain statements were admitted into evi-

---

[3] This is improperly characterized by the defendant as "hearsay;" of course, it is not. Evid. R. 801(D)(2)(a) quite clearly excludes from hearsay those statements offered against a party consisting of his own statements.

> dence prior to a decision as to the declarant's status as a conspirator. The law is well settled in this circuit that declarations that are otherwise hearsay may nevertheless be provisionally admitted, subject to eventual connection of the defendant with the conspiracy alleged, as long as the trial court is ultimately satisfied that the participation of the defendant against whom the declaration is offered has been established by a fair preponderance of the evidence independent of the hearsay utterances. *United States* v. *De Fillipo*, 590 F. 2d 1228, 1235-36 (2d Cir. 1979) (following *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028, 90 S. Ct. 1276, 25 L.Ed.2d 539 (1970)).

U.S. v. *Cambindo Valencia* (2nd Cir. 1979), 609 F.2d 603, 630. *See also U.S.* v. *Papia* (7th Cir. 1977), 560 F.2d 827; *U.S.* v. *Macklin* (8th Cir. 1978), 573 F.2d 1046; *U.S.* v. *James* (5th Cir. 1979), 590 F.2d 575; *U.S.* v. *Graham* (8th Cir. 1977), 548 F.2d 1302; *U.S.* v. *Williams* (8th Cir. 1976), 529 F.2d 557; *U.S.* v. *Sanders*, (8th Cir. 1972), 463 F.2d 1086. *See generally* M. Graham, *Handbook of Federal Evidence* § 801.25 (1981); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶104(05) (1982), where a review of the federal circuits holdings on the issue is listed at footnote 29.

We take it, therefore, that the Ohio rule, as expressed, and the federal rule, as interpreted, are substantially the same. It ther becomes relevant to examine federal decisions dealing with the issue of whether a confession of conspiracy by a defendant will constitute evidence *aliunde*, or independent proof, sufficient to bottom out-of-court statements of co-conspirators. These authorities, we conclude, sustain the state's position that statements of the defendant probative of the existence of a conspiracy will suffice to furnish the independent proof of the conspiracy

requisite under the rule. Thus, in *U.S.* v. *Gallagher* (7th Cir. 1971), 437 F.2d 1191, the defendant argued that there was no evidence connecting him with his brother in a conspiracy to defraud, so that out of court statements of his brother and an unindicted co-conspirator could not properly have been used against him. The Court noted:

> The flaw in appellant's argument which makes it inapposite is that here the record discloses that there is independent evidence of appellant's connection with the conspiracy which serves to make the declarations of his brother . . . admissible against appellant.

Id. at 1193. The independent proof, noted the court, consisted of a number of inculpatory statements made by the appellant himself to various witnesses. Similarly, in *U.S.* v. *Cerone* (7th Cir. 1971), 452 F.2d 274, a case of conspiracy to use interstate facilities in aid of illegal gambling, the court framed the issued as follows:

> Finally in this regard, defendants argue that it was error to admit the testimony of Bombacino as to extrajudicial declarations and acts of the defendants absent prior independent proof of the existence, scope and membership of the conspiracy. It is axiomatic that such declarations and acts of a co-conspirator may not be admitted in evidence against a defendant absent independent evidence establishing his participation in the conspiracy. *E.g.*, *Glasser* v. *United States*, 315 U.S. 60, 74-75, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Oltman* v. *Miller*, 407 F.2d 376, 378-379 (7th Cir. 1969); *United States* v. *Stadter*, 336 F.2d 326, 329 (2d Cir. 1964); *cf. Logan* v. *United States*, *supra*, at 144 U.S. 309, 12 S. Ct. 617. Defendants proceed from that well-established principle to assert that there was no such independent evidence here, or, in the alternative, that if there was independent evidence it was insufficient to validate the admission of Bombacino's testimony.

Id. at 283. Rejecting this argument, the court noted that although courts have admitted such evidence on a theory that the defendant's inculpatory statements constituted admissions against interest and hence were admissible in themselves,

> the better view is that such admissions are not hearsay at all and are admissible absent other reasons for exclusion. . . . As evidence independent of the hearsay statement of a co-conspirator, such admissions may quite properly constitute corroborative evidence sufficient to justify the admission of a co-conspirator's hearsay declarations.

Id. at 284.

In *U.S.* v. *Cirillo* (2nd Cir. 1974), 499 F.2d 872, the court concluded that the non-hearsay evidence of a conspiracy, the principal item of which was a "devastatingly incriminatory telephone conversation" with the defendant, *id.* at 884, was sufficient to admit hearsay statements of co-conspirators. In *U.S.* v. *Rodriguez* (5th Cir. 1975), 509 F.2d 1342, the rule is encapsulated in the following extract:

> Appellant first contends that extrajudicial statements made by co-defendants Castro, Arteaga, and Yepez, outside the presence of the appellant were improperly admitted into evidence. We hold that these statements, although hearsay, were properly admitted as declarations of co-conspirators made during the course of the conspiracy and in furtherance of it.
>
> Of course, the government must introduce sufficient independant [*sic*] evidence of the existence of a conspiracy and of appellant's participation therein before the judge may allow declarations of the co-conspirator, made outside of the presence of the defendant, to go to the jury. *United States* v. *Apollo,* 476 F.2d 156, 157 (5th Cir. 1973); *Montford* v. *United States,* 200 F.2d 759, 760 (5th Cir. 1952). The test of sufficiency

> is whether the other evidence, *aliunde* the hearsay, would be sufficient to support a finding that the defendant himself is a conspirator – that is, whether the government has established a prima facie case of the existence of a conspiracy and of defendant's participation therein. *United States* v. *Oliva*, 497 F.2d 130, 132-33 (5th Cir. 1974).
>
> The trial judge properly required that the government show the appellant's participation in the conspiracy by evidence other than hearsay before allowing the jury to hear any of the extrajudicial statements of the co-conspirators. *The government met this burden by having Agent Scrocca describe the July 16, 1971 meeting with Rodriguez (i.e., the defendant). The judge then held that the government had made a sufficient showing that Rodriguez was a member of the conspiracy.* We believe the judge's ruling that sufficient evidence of a conspiracy and of defendant's participation therein had been presented was correct (emphasis added).

Id. at 1346.

We conclude from these authorities, as well as from the logic of the problem, that the non-hearsay admissions against interest of the defendant may be considered as establishing the "independent proof" of the conspiracy necessary to satisfy the requirements of Evid. R. 801 (D) (2) (e), removing from hearsay disabilities the statements of co-conspirators made during the course and in furtherance of a conspiracy. What, after all, is more persuasive or reliable evidence of the existence of a conspiracy than the admission by the defendant, freely and voluntarily given, that such conspiracy did in fact exist and included her among its members?

Finally, the defendant argues under her third assignment of error, that since at least some of the statements

of the co-conspirators were made after the conspiracy had arguably terminated, they were not made "during the course and in furtherance of the conspiracy" within the meaning of Evid. R. 801 (D) (2) (e).[4] This argument was, however, addressed by the Supreme Court in *State* v. *Shelton* (1977), 51 Ohio St. 2d 68, 364 N.E.2d 1152, *vacated on other grounds* (1978), 438 U.S. 909, 98 S. Ct. 3133, where the syllabus holds:

> 1. A conspiracy to commit a crime does not necessarily end with the commisison of the crime.
>
> 2. A declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity.

We find this statement of the law necessarily dispositive of all of the instances of statements by co-conspirators cited by the defendant, at least up to the point where each of the two co-conspirators made their formal taped confessions approximately a day and one-half after the homicide.[5] Until that point, both Goerler and Catherine Duerr were still obviously concerned with the concealment of their criminal conduct. All such statements, which include nearly all

---

[4] The defendant also argues that the *crime* of conspiracy terminates when its objects are committed. R.C. 2923.01. This is offered to supplement the thrust of the above quoted language of Evid. R. 801(D)(2)(e), but has, in fact, no bearing on the instant issue. The defendant was not indicted for the specific crime of "conspiracy" as defined in R.C. 2923.01, nor tried under its provisions. The question, rather, involves the common law concepts of conspiracy as that word is used in the evidence rules in question.

[5] *But see* P. Giannelli, *Ohio Evidence Manual* § 801.15 at 15-16 (1982), for contrasting federal rule.

of those instanced to us by the defendant, were therefore either made during the course and in furtherance of the conspiracy, or were made while the conspirators were still concerned with concealment of their criminal conduct.

The only "statements" of the co-conspirators cited to us by the defendant that might arguably lie beyond the obvious scope of *Shelton* occurred during the rebuttal testimony of Lt. Hulgin. A review of the record reveals that the following was the extent of that testimony:

Q. Officer, would you again state your name and spell your last name?

A. My name is Raymond Hulgin, H-u-l-g-i-n.

Q. And you were previously sworn in this same cause, officer, if you remember.

Officer, directing your attention again to the evening of May 20 and early morning hours of May 21, 1981, did you have an occasion to take a statement from Dennis Goerler?

A. Yes, sir, I did.

Q. And at any point did you advise Mr. Goerler of his constitutional and Miranda rights?

A. Yes, I did.

Q. And when did you take a statement from him in relation to that fact?

A. In relation to advising him of his rights?

Q. Yes.

A. His statement was taken immediately following the advice of his rights.

Q. What happened after that statement was concluded?

A. Dennis Goerler was placed under arrest and charged with aggravated murder.

Q. And what happened to him physically after being placed under arrest?

A. He was processed as a prisoner; that is, he was fingerprinted and photographed and the necessary paperwork was made out concerning the charges placed against him.

Q. Did he remain in the custody of the Hamilton County sheriff at that time?

A. Yes, he did.

Q. And does he so remain even until today?

A. Yes, he is.

MR. MOOREHEAD: Thank you very much, officer. No further questions.

T.p. 621-622.[6]

It is immediately apparent that no "statement" of the co-conspirator, Goerler, was introduced or attempted, merely the *fact* of its having been taken, a fact which required precedent *Miranda* warnings and occasioned his subsequent arrest and detainment. The defendant argues that the jury may well have drawn invidious conclusions from this recitation, but that is not to argue that the testimony of Lt. Hulgin was inadmissible under Evid. R. 801 (D) (2) (e), the challenge posed by the assignment of error. It was not so inadmissible; the testimony does not relate an out-of-court statement at all.

---

[6] We find no specific objection to this testimony in the record. There was considerable argument centering on Evid. R. 801(D)(2)(e) in connection with a Rule 29 motion at the conclusion of the state's case, renewed at the end of all the evidence, but no attempt to relate the above rebuttal testimony directly to that argument.

The defendant's third assignment of error is overruled, and the judgment of the trial court is affirmed.

DOAN and KLUSMEIER, JJ., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.

APPENDIX B

THE SUPREME COURT OF OHIO
1983 TERM
To wit: March 9, 1983

No. 83-57

THE STATE OF OHIO)
)
City of Columbus.)

State of Ohio,

Appellee,

vs.

Carol Duerr and Catherine Duerr,

Appellants.

APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

[CERTIFICATION OMITTED]

THE SUPREME COURT OF OHIO
1983 TERM

To wit: March 9, 1983

No. 83-57

THE STATE OF OHIO)
)
City of Columbus.)

State of Ohio,

Appellee,

vs.

Carol Duerr and Catherine Duerr,

Appellants.

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by H. Fred Hoefle.

[CERTIFICATION OMITTED]

NO. 82-1820

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAROL DUERR,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER A CONFESSION IS ADMISSIBLE UNDER THE FOLLOWING CIRCUMSTANCES: THE DEFENDANT HAS BEEN ADVISED THREE TIMES OF HER MIRANDA RIGHTS AND SIGNS A WRITTEN WAIVER THEREOF AND NEVER REQUESTS COUNSEL; THE DEFENDANT IS VOLUNTARILY PRESENT AT THE POLICE STATION TO COOPERATE WITH THE POLICE; THE DEFENDANT IS ACCOMPANIED BY TWO COMPANIONS; THE DEFENDANT IS PROVIDED FOOD AND LOUNGE FACILITIES; THE DEFENDANT IS GIVEN UNLIMITED USE OF A PHONE; THE DEFENDANT RETAINS FREEDOM OF MOVEMENT AND IN FACT LEAVES THE STATION ALONE AND RETURNS; AND THE DEFENDANT IS COURTEOUSLY TREATED AT ALL TIMES.

II

WHETHER A PETITIONER FOR A WRIT OF CERTIORARI CAN BASE A CLAIM OF ERROR UPON A SET OF FACTS WHICH ARE NOT PRESENT IN THE RECORD.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-1820

CAROL DUERR,

Petitioner,

vs.

THE STATE OF OHIO,

Respondent.

OPINIONS BELOW

The opinion of the Ohio First District Court of Appeals, affirming petitioner's conviction, and released November 17, 1982 is accurately set forth in petitioner's brief. It is also set forth as appendix A herein. The decision of the Ohio Supreme Court refusing to review this case, released March 9, 1983, is accurately set forth in petitioner's brief.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 1257 (3), and raises issues dealing with a claimed denial of constitutional rights.

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution:

> "No person. . . shall be compelled in a criminal case to be a witness against himself, . . ."

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense."

Fourteenth Amendment, United States Constitution:

> "Section 1. . . No state shall. . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

a) Procedural Posture:

Petitioner Carol Duerr was arrested on May 21, 1981, in connection with a homicide which occurred on May 19, 1981. On May 27, 1981, petitioner Duerr was indicted by the Hamilton County, Ohio Grand Jury, charged with one count of aggravated murder. Trial began on August 31, 1981, and concluded on September 3, 1981. Petitioner was found guilty as charged and a sentence of life imprisonment was imposed. On November 17, 1982, the Ohio First District Court of Appeals affirmed petitioner's conviction. On March 9, 1983, the Ohio Supreme Court declined to review the case.

b) Facts:

On the evening of May 19, 1981, the Hamilton County, Ohio, Sheriff's Patrol received a phone call regarding a possible homicide at 7929 Asbury Hill Drive in the Anderson Township area of Hamilton County. Officers who responded to the scene found the body of Raymond Duerr on the second floor of the home. Mr. Duerr, an executive

with Cincinnati Gas and Electric, had been shot twice and was deceased. The patrol officers first on the scene at once called their superiors and several detectives responded to the scene. The time was approximately 8:30 p.m.

Initial investigation led the detectives to believe that a burglar had killed Mr. Duerr since the assailant had apparently kicked in a garage door to gain entrance, and had then been surprised by Mr. Duerr when he arrived home from work. Police continued to do a crime scene workup at the Duerr residence during the evening, with Detective Hulgin, the officer in charge, having arrived on the scene at about 9:45 p.m.

Petitioner Carol Duerr, the wife of the deceased, and Cathy Duerr, step-daughter of the deceased, along with Cathy's boyfriend Dennis Goerler, had discovered the body and reported the crime. When the first officers arrived on the scene they had instructed these three to leave the scene and stay at a neighbors home until later. At about 11:00 p.m. Detective Hulgin went to the neighbors residence to speak to these three. Hulgin spoke to Carol Duerr for about an hour, in an effort to establish a time frame for the crime and to see if she could provide any information. (R. 86)

During the early investigation and through the afternoon of May 20th, the police theory of the case gradually began to change. The police began to discard their original theory that a professional burglar had committed the crime. There were two reasons for this change. First it was felt a professional burglar would not be at work at the time the crime was committed, since late afternoon and early evening hours are most likely to find people at home. Secondly, it was felt that a professional burglar would only shoot once and then flee rather than pursuing the victim and shooting

twice as was done here. For these reasons the police began to theorize that the crime was committed by a burglar who lived in the area, perhaps an amateur or a teen-ager, someone whom Mr. Duerr could have identified, and who for that reason felt compelled to kill him to prevent arrest. (R. 90, 162) Detective Captain Henke of the Sheriff's Patrol explained the police theory of the case as of early on May 20th, 1981.

> "One, was the fact that the victim was shot twice. He was shot in one location, pursued to another location, and shot again. This is not, the normal burglar in our opinion would, if he would have to shoot somebody, would only shoot once and normally they would run to try to get away from somebody, out of the house, shoot once and run. It was our opinion at that point, the direction we were looking was possibly a neighborhood burglar, someone Mr. Duerr knew, and that's the reason he was shot twice, pursued. In other words, shot once in one location, pursued to another location and shot again. It was at that point we were pursuing a local burglar that was known to Mr. Duerr." (R. 162)

* * * *

> "Well, one was the time frame. The professional burglar usually doesn't work in that time frame so that we felt, in other words, supper hour, professional burglars usually try to avoid that hour because lots of people coming and going home from work. That's one of the things that led us to believe possibly a juvenile or somebody in the neighborhood." (R. 163)

At this time no one had ever considered Dennis Goerler, Cathy Duerr or petitioner Carol Duerr as suspects in this case. (R. 49, 136, 138, 163)

After discussion on May 20th the police decided to reinterview petitioner Carol Duerr, Dennis Goerler and Cathy

Duerr to see if they could develop some leads as to this theory. A police officer called petitioner Carol Duerr and asked if she would drop by Patrol Headquarters for an interview and if Dennis Goerler and Cathy Duerr would come also. Carol Duerr was also interested in picking up some of her husband's property and she agreed to stop by with the others at about 6:00 p.m. Detective Hulgin explained the reason for the interview as:

> "Detective Diersing requested Mrs. Duerr, Catherine Duerr, and Dennis Goerler respond to our Headquarters so that we may further interview those persons who may be able to provide us with certain information that could give us possible leads in the investigation." (R. 48) See also R. 143 and 145.

Dennis Goerler, Carol Duerr, and Catherine Duerr arrived at the Hamilton Avenue Sheriff's Patrol at 6:00 p.m. on the 20th in response to the police request to drop by for interviews.

When these three arrived the front door to the facility was locked, and they entered through the rear and were escorted to a waiting room. At this time petitioner Carol Duerr was told that the property she was seeking was not at the station. The waiting area where they were seated was described as follows:

> "A. You walk into a foyer, a large hall. Situated in this hallway several pieces of leather furniture, a couch, chairs, the stand with some magazines, and the ladies restroom is off of the hallway and off that hallway, back the other end of the building, were the headquarters, deputies, where persons are remanded.
> Q. This lounge area is like a separate room from the detective rooms or the clerk's room or the record room or what have you. Isn't that correct?

A. Yes, sir, like a waiting room.
Q. Like a waiting room and a person can come and go in that room as they please; isn't that correct?
A. That's correct?
Q. There are no detective stations out there, are there?
A. No." (R. 142)

The two Duerrs and Goerler sat in this lounge alone from 6:00 p.m. until 6:45 p.m. At no time were they restrained of their liberty or denied freedom of movement, and during this initial period there were not even any police officers in the area.

At 6:45 p.m. Detective Hulgin asked petitioner Carol Duerr to talk to him in an interview room. Carol Duerr was not a suspect at this time and no *Miranda* warnings were given. This interview lasted from 7:00 p.m. until 8:30 p.m. Petitioner Carol Duerr made no incriminating remarks at this time and she did not incriminate either Dennis Goerler or Cathy Duerr. At this time petitioner Carol Duerr returned to the lounge and shortly therafter Cathy Duerr and Dennis Goerler were asked to enter different interview rooms. Detective Hulkin interviewed Cathy Duerr, and while this was going on defendant Goerler sat in another room and carried on a general conversation with some other officer.

At 10:45 p.m. Detective Hulgin began to interview Dennis Goerler. (R. 64) At this time Goerler was not under arrest and would have been free to leave if he had wanted to. Likewise Carol and Catherine Duerr were not under arrest, and both were free to leave if they so desired. During the evening both Duerrs had freedom of movement and petitioner Carol Duerr made numerous phone calls to her mother, in which she indicated her own belief that

she would be free to leave. Petitioner Carol Duerr was also provided with food during the course of the evening. Catherine Duerr spent much of her time sleeping. (R. 190) At one point Cathy Duerr actually left the station alone and then returned. Shortly after entering the interview room Goerler told Hulgin that his stomach was bothering him and that his medicine was gone. (Goerler had brought some medicine with him but had consumed it.) At this time petitioner Carol Duerr then left the police station alone and drove to a drug store, bought some medicine and brought it back to Goerler. Besides being provided with medicine the Sheriff's Office also bought Goerler a salad and milk which he ate. The interview then continued after this. At about 12:20 a.m., during the interview, Goerler made a remark which detective Hulgin at once felt to be of a somewhat incriminating nature. (R. 64, 65) At this time Hulgin orally advised Goerler of his *Miranda* rights. (R. 64)

Hulgin then explained to Goerler why he was not suspicious of him and told him what possible charges he faced. Goerler then indicated that he would give a statement. (R. 67). Hulgin also told Goerler that before Goerler said anything further he would like another officer to be present, (R. 69), and Detective Diersing came into the room. At 12:50 a.m. Goerler executed a formal *Miranda* acknowledgement, and waiver form, in the presence of the two officers. Recording equipment was then set up and a recorded statement was then taken from Goerler. The first item that appears on the recorded statement is a readvisement and waiver of the *Miranda* rights. (See exhibit #1 at motion) In the body of this statement Goerler acknowledges his involvement in the Duerr homicide. He also incriminated both petitioner Carol Duerr and Cathy Duerr in a conspiracy to kill Raymond Duerr.

After Goerler gave his statement police officers then re-interviewed Cathy Duerr. She was advised of what Dennis Goerler had stated, and she was advised of her *Miranda* rights and signed a waiver form. At 4:21 a.m. Cathy Duerr then gave police a lengthy statement concerning her involvement in the Raymond Duerr homicide. During the course of this statement she incriminated both Dennis Goerler and Carol Duerr. This statement concluded at about 5:20 a.m.

Police then decided to re-interview petitioner Carol Duerr. Officers Hulgin and Datillo interviewed Carol Duerr, beginning sometime after 6:00 a.m. on the 21st. The first procedure was to orally advise her of her *Miranda* rights. (R. 131) She was then told that both Dennis Goerler and Cathy Duerr had given statements and had incriminated her. Carol Duerr agreed to give a taped statement to police. This statement began at 7:20 a.m. and concluded at 8:10 a.m. The first thing which appears on this taped statement is an acknowledgement and waiver of the *Miranda* rights. In this statement Carol Duerr admits her involvement in the Raymond Duerr homicide. The closing series of questions and answers on this tape are as follows:

"H. Okay, we're going to cut this off now, is there anything else you would like to say, anything you'd like to add, any comments you'd like to make, questions you have, anything at all?
C. I guess not.
H. Do you feel that we have coerced you in any way?
C. No.
H. That we mistreated you in any way?
C. No way.
H. Alright Carol if there is nothing further that you

> would like to comment on at this time we conclude this tape. The time is 8:10 a.m."

At no time during this period did Carol Duerr request an attorney or indicate she had one.

During the morning of the 21st attorney Stewart Mathews, who was going to handle the estate of Raymond Duerr, received a call from a member of the family advising him that Carol Duerr was at the police station under arrest. At this time petitioner Carol Duerr had not hired Mathews to represent her in criminal charges, in fact she had not been charged. Attorney Mathews, at that time, was solely concerned with the estate. Mathews called the police station and was told that Carol Duerr had given a statement and had been charged and was being processed. (R. 262) Captain Henke of the Sheriff's Office spoke to attorney Mathews and testified that at the time of the call all questioning was over and the booking procedure had begun. (R. 171) When the procedure was completed Carol Duerr did call attorney Mathews, who advised her to cease talking and to sign nothing. In fact Carol Duerr did refuse to sign the transcription of her statement.

REASONS FOR DENYING WRIT

I

A CONFESSION IS PROPERLY ADMITTED AT TRIAL WHERE THE RECORD DEMONSTRATES THAT: THE DEFENDANT WAS ADVISED OF HER MIRANDA RIGHTS THREE TIMES AND SIGNED A WAIVER THEREOF; THAT THE DEFENDANT NEVER REQUESTED COUNSEL; THAT THE DEFENDANT VOLUNTARILY APPEARED AT THE POLICE STATION; THAT THE DEFENDANT WAS ACCOMPANIED BY TWO COMPANIONS; THAT THE DEFENDANT WAS SEATED IN A LOUNGE AREA AND GIVEN FOOD, THAT THE DEFENDANT HAD UNLIMITED USE OF A PHONE, THAT THE DEFENDANT HAD FREEDOM OF MOVEMENT TO THE EXTENT THAT SHE LEFT THE STATION ALONE AND RETURNED, AND THAT THE DEFENDANT IS COURTEOUSLY TREATED AT ALL TIMES.

Petitioner contends that the lower Court erred in overruling her motion to suppress her statement to police. Petitioner's arguments in this regard are based upon an assumption of facts which are not supported by the record. In many instances the facts here were in dispute at the motion to suppress (which was conducted jointly) with petitioner claiming one thing and police officers testifying to the contrary. In resolving disputes such as this, certain rules have gained widespread acceptance at the appellate level. Thus it is generally held that the trier of fact is the sole judge of the credibility of witnesses and weight of the evidence. In this case the trial judge was the trier of fact at the motion to suppress. He chose to disbelieve the defen-

dants and to believe the police testimony. This finding can not be challenged on appeal. Further, on appeal the evidence must be viewed in the light most favorable to the party which prevailed at trial. *Burks* v. *United States*, 437 U.S. 1, 98 S.Ct. 2141 (1978). In this case the state prevailed at the motion to suppress and is thus entitled to draw all necessary favorable inferences from the evidence presented there.

The facts present here show that the joint motion to suppress was properly overruled. Initially it should be noted that the strictures of *Miranda* were complied with, not once, but three separate times. *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Petitioner was advised of her rights orally, read and signed a written waiver form, and was advised on tape for all to hear. At no time did she ever request an attorney. In the latter two cases this is not even a dispute between police and defendant with no independent evidence. The Court can look at the written waiver, and listen to the tape, and observe that petitioner never requested counsel when she had the perfect opportunity to do so. The police here scrupulously adhered to the guidelines of *Miranda*. Petitioner argues that *Miranda* is only the starting point in a suppression case. This is not true here. Where police demonstrate, convincingly, that proper procedures have been followed, the defendant must show some extraordinary factor to justify suppression.

Before dealing with the defendant's specific complaints here it is important to set the background. A murder had just occurred. The police had no leads and no suspects. In homicides it is important to act at once, most homicides, if not solved quickly, are not solved at all. Because of this the police officers involved here were working round the

clock, with little or no sleep. In order to develop leads they asked petitioner Carol Duerr, Cathy Duerr and Dennis Goerler to come in for interviews. These three were not at the police station as murder suspects. They were there playing the role of "bereaved" wife and daughter, cooperating with the police in an effort to solve the murder of Raymond Duerr. That is why they came to the police station that evening, and that is why they cooperated by remaining there.

The facts relevant to the petitioner's confession may be chronologically listed as follows:

1) Petitioner Carol Duerr and her companions arrive at the police station at 6:00 p.m. and are seated in lounge area until about 7:00 p.m. No police are present.

2) Carol Duerr interviewed at about 7:00 p.m. until 8:45 p.m. She is not a suspect, is not advised of her rights, does not request an attorney, and does not incriminate herself.

3) Cathy Duerr interviewed. She is not a suspect, and does not incriminate anyone.

4) Dennis Goerler interviewed. During this interview Carol Duerr leaves station *alone* and drives to drug store to buy medicine for Goerler. She calls her mother but does not call an attorney, and returns to station.

5) During evening petitioner Carol Duerr makes about four phone calls and is provided with food. She has complete freedom of movement and is not in custody.

6) Dennis Goerler gives statement and incriminates all three defendants.

7) Cathy Duerr interviewed, and at 4:20 a.m. gives taped statement incriminating all three defendants.

8) At 6:30 a.m. Carol Duerr is advised of her rights, signs waiver, and at 7:20 gives taped statement at issue here.

9) At 8:10 a.m. statement ends and arrest processing begins. Attorney Mathews later calls, and petitioner Carol Duerr returns call.

During the entire evening petitioner Carol Duerr was never arrested. She remained in a lounge area with her companions present much of the time. She made numerous phone calls, and had free use of the restroom. She was provided with food and even drove away alone at one point. She never requested an attorney despite the obvious opportunity to do so. The facts here show a free, honest, and voluntary confession. It is interesting to note the petitioner apparently concedes her confession is truthful, but contends it must be suppressed as being involuntary in nature.

(1) Petitioner argues that she was subjected to prolonged detention. This is not true. Petitioner was not in detention until after she gave her statement. Petitioner voluntarily came to the station to be interviewed, and at least until her codefendants incriminated her she was always free to leave. In fact, petitioner Carol Duerr drove to a drug store alone, made a phone call, and returned. Catherine Duerr also left alone and returned at one point. This could hardly be called detention. Petitioner was never in a cell, always in a lounge area, and her companions were with her or close by. Officer Datello sat with her at times to keep her company, not to arrest her, and he never restrained her in any way. The fact that the interview took place at a police station does not mean that detention occurred. *Oregon* v. *Mathiason,* 429 U.S. 492, 97 S.Ct. 711 (1977). In *Mathiason,* the Court stated:

> "In the present case, however, there is no indication that the questioning took place in a context where respondent's freedom to depart was restricted in any way. He came voluntarily to the police station, where he was immediately informed that he was not under arrest. At the close of a ½-hour interview respondent did in fact leave the police station without hindrance. It is clear from these facts that Mathiason was not in custody 'or otherwise deprived of his freedom of action in any significant way'."

Just because Carol Duerr was at a police station does not mean she was in detention. In *State* v. *Barker,* 53 O.S.2d 135, 372 N.E.2d 1324 (1978) the Ohio Supreme Court defined arrest at follows:

> "The existence of an arrest is dependent not upon the fact that a suspect who voluntarily comes in for questioning concerning possible involvement in a murder is immediately given the *Miranda* warnings, nor upon the period of the questioning, but upon the existence of four requisite elements: (1) An intent to arrest, (2) under real or pretended authority, (3) accompanied by an actual or constructive seizure or detention of the person, and (4) which is so understood by the person arrested."

In the present case there was never any intent to arrest petitioner. There was no reason to even suspect her until after midnight, she was never physically arrested, nor did she understand herself to be restrained. In sum, there was no prolonged detention here.

(2) Petitioner cites to *Watts* v. *Indiana,* 338 U.S. 49, 69 S.Ct. 1347 (1949) and similar cases to argue that the denial of food is a ground for suppression. Unfortunately for the petitioner this factor is not present here. Petitioner was provided with food. (R. 203) She did not arrive at

the station until after normal dinner hours. During the evening, around midnight, she was given a hamburger. During the course of the evening petitioner Carol Duerr consumed "drinks, crackers, soft drinks, coffee." Quite simply there was no deprivation of food. In fact, she could have fed herself again when she left the station alone.

(3) Petitioner argues that she was without sleep for several hours. (R. 301) This of course, if true, was not the fault of the police. When the petitioner arrived at the station she was treated comfortably and courteously. She was seated in a lounge area and could have slept if she wanted to. [In fact co-defendant Catherine Duerr did sleep in the lounge area.] The tape recorded statements here do not reveal defendants befudled by lack of sleep. Rather they reveal very alert coherent persons. Lack of sleep is not a factor here.

(4) Petitioner contends she was ill while at the police station. Carol Duerr never communicated this to the police, but did use the restroom repeatedly. In her confession she indicated she had weak kidneys, and in fact, urinated on herself when she saw her husband's body. This is not the type of "illness' which would induce an involuntary confession, particularly where there is no denial of access to the restroom. Officer Datello, who sat with Carol Duerr much of the evening, denied that Carol Duerr ever appeared ill. (R. 185) Illness simply was not a factor in this confession.

(5) Finally petitioner indicates that the "leading" nature of the statement indicates that it is involuntary in nature. In fact the statement is not leading in nature, and is replete with fully explanatory answers. The questions are generally phrased so as to elicit explanations rather than yes or no answers. In an effort to make this

case fit in with list of criteria found to be improper in other cases counsel simply asserts that such factors are present, when in fact they are not. From this false factual premise petitioner's counsel then points to his long list of conjured up "violations" and argues, in effect, that where there is smoke there must be fire. In fact the only smoke present here is in appellant's brief, not in the record. There was no prolonged detention here. There was no denial of food or sleep. Petitioner was not ill, and never requested an attorney, and the statement is more narrative than leading in nature. The trier of fact obviously did not find any of the things petitioner now complains of to be true, and his findings are supported by the record. Petitioner's claims here are without merit.

II

A CLAIM OF A DENIAL OF THE PRIVILEGE AGAINST SELF-INCRIMINATION, BASED UPON A SET OF FACTS NOT PRESENT IN THE RECORD, CANNOT BE THE BASIS FOR THE GRANTING OF A PETITION FOR CERTIORARI.

Petitioner asserts that this case presents for review the issue of whether an attorney can invoke the privilege against self-incrimination on behalf of his client. Petitioner argues that her attorney called the police while her statement was being taken and told them to cease questioning her. Unfortunately for petitioner's argument, the record will not support such a claim. The testimony at the motion to suppress by the police was that the attorney's call did not come in until *after* the statement had been completed.

and petitioner was being processed. In fact petitioner was never questioned after the attorney's call came in.

The issue petitioner seeks to raise here is not factually present in the record. As the Ohio Appellate Court noted in disposing of this issue:

> "The second aspect of this argument concerns a telephone call to the station made sometime on the morning of May 21st by the defendant's attorney. It is agreed that such a call was made and received, and that the attorney was told that interrogation of the defendant had already ceased because her statement had been completed. It is further agreed that the defendant's statement was completed at about 8:10 a.m. The problem arises from testimony adduced on behalf of the defendant that the call was made to the station shortly after 7:45 a.m., which would obviously have been before the statement had been completed and would, if accurate, raise the constitutional problem addressed in *Escobedo* v. *Illinois* (1964) 373 U.S. 478, 84 S.Ct. 1758, and *Edward* v. *Arizona* (1981), 451 U.S. 477, 101 S.Ct. 1880. See also *State* v. *Burt*, C-790438 (1st Dist. May 14, 1980). An issue of fact was, however, presented to the trial court as to when this call was actually made. The officer who received the attorney's call, Captain Henke, the supervising officer in the investigation, testified quite positively that it was not made until after the defendant's statement had been completed. T.p. 172, which would necessarily place the call after 8:10 a.m.
>
> The defendant argues that we are able to, and should, find the trial court's adverse resolution of this factual dispute to be contrary to the manifest weight of the evidence. This would require, obviously, that we discount Captain Henke's testimony on the timing of the call, and accept in its most favorable light that of Mathews, the defendant's attorney. He testified that he had received the call from Mary Beth Duerr alerting him that the defendant had been at the station all

> night at 'approximately' 7:45 a.m. and that, after completing this call, he 'immediately' called the station and spoke to Henke. T.p. 261, 262. It would also require that we discount the trust of his testimony that the defendant returned his call at 'approximately 8:10 or 8:15 a.m.' after she had finished her statement and the subsequent fingerprinting and photographing. T.p. 262, 267, 268. We find no justification, under these circumstances, for substituting our judgment on the issue for that of the trier of facts, and decline to do so."

Petitioner argues however, that *Tibbs* v. *Florida*, —— U.S. ——, 102 S.Ct. 2211 (1982), allows this Court to assess the credibility of witnesses, and urges this Court to find that, based on the transcript, the police officers were lying about this. There is nothing in the record that would cause one to suspect the credibility of Detective Henke, who testified at the motion to suppress and specifically stated that the call came after the statement had been completed. (R. 171-72) This testimony was confirmed by Detective Bennett. (R. 341) The trier of fact chose to believe the police and find that the attorney was mistaken as to the time frame. There is absolutely nothing in the record to make the police testimony suspect. Respondent submits that this claim of error is not demonstrated in the record.

CONCLUSION

This case presents no issues which need review by this Court. For the most part both issues presented by petitioner are based on facts not present in the record. In order to give consideration to the legal issues presented by petitioner this Court must first totally reject all the factual findings by the trial court, who sat as trier of

fact, and accept as gospel truth everything the petitioner testified to. There is no reason whatsoever for this Court to take such a step.

Petitioner's confession was preceded by three sets of Miranda warnings and a signed waiver. She never requested counsel and gave a taped statement. The record shows that she voluntarily went to the police station with two companions, that she was treated courteously and seated in a lounge area. She was never placed in a cell. She was provided with food and given unlimited use of a telephone. She had freedom of movement and at one point left the station in her car alone and drove off, returning later. Respondent submits that in these circumstances the confession was properly admitted, and that the petition for writ of certiorari should be denied.

Respectfully,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-810761

STATE OF OHIO,

Plaintiff-Appellee,

vs.

CAROL DUERR,

Defendant-Appellant.

OPINION

(Filed November 17, 1982)

APPEAL FROM THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Messrs. Simon L. Leis, Jr., William E. Breyer, Arthur M. Ney and R. Thomas Moorhead, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee.

Messrs. Wm. Stewart Mathews, II and James M. Rueger, 1300 American Building, 30 East Central Parkway, Cincinnati, Ohio 45202, and Mr. H. Fred Hoefle, 1010 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PALMER, P.J.

The defendant-appellant was indicted on a charge of aggravated murder of her husband, Raymond Duerr. Indicted with her on the same charge were her daughter, Catherine Duerr, and Dennis Goerler. Separate trials were requested and granted. In due course, an evidentiary hearing was held on the defendant's motion to suppress, heard by stipulation along with similar motions by the other two defendants, and the motion was overruled. The matter then proceeded to trial by jury, at the conclusion of which the defendant was found guilty as charged and was sentenced as appears of record. Appeal was timely filed, with three assignments of error raised for review, considered here in the order of presentation.

For her first assignment of error, the defendant asserts that the trial court erred in denying her motion to suppress an inculpatory statement said to have been involuntarily given and to have been extracted in the absence of appellant's attorney. This assignment of error may be said to proceed in two parts; first, defendant argues that the length of time she spent at police heardquarters, her state of health, both mental and physical, and the circumstances of her ultimate confrontation by police after they had first secured inculpatory statements from Catherine Duerr and Dennis Goerler, all combine to deprive the statement she made to police of its voluntary and knowing nature, requiring — it is argued — its suppression. Second, the defendant argues that the statement was taken from her after she requested and was denied the assistance of counsel, and, in any event, after the police were aware of the fact that she was represented and that her counsel was attempting to reach her. For the reasons hereinafter set forth, we find neither argument to possess merit.

As to the first argument under this assignment of error, we simply find nothing in the record which would compel or require the conclusion of the trier of fact that the statement was taken under circumstances which, by virtue of their coercive, unduly suggestive, or other improper nature, deprived defendant's statement of its voluntary character. The defendant points, in support of her thesis, to her prolonged detention, her inexperience with the criminal justice system, her argued lack of nourishment and sleep, and her asserted physical illness, together with what is urged to have been the suggestive nature of the interrogation.[1] Yet the record convincingly demonstrates that from the time defendant arrived at the police station until she was actually implicated in the crime, she was under no suspicion of complicity and under no restraints.

Thus, defendant and her two companions arrived at police headquarters at 6:00 p.m. on May 20, 1981. They were seated in a general lounge area until the defendant was called for an interview that lasted from 7:00 to 8:45 p.m. After the interview, defendant returned to the lounge area and remained there until Dennis Goerler and Catherine Duerr implicated her during the early morning hours of the 21st. During this period, she made and received a number of telephone calls, left the station unaccompanied to purchase medicine for Goerler, went to the restroom several times, was served food by the police, and spent most of the balance of the time in the lounge area of the station with immediate access to the outside. Not until first

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[1] We refer to the companion case of *State* v. *Goerler*, No. C-810778, released this day, for a recital of the sequence of events that marked the questioning and interrogation of the parties on the evening of May 20th and early morning hours of May 21st, as well as the events preceding this period of questioning.

Goerler and then the defendant's daughter actually implicated the defendant did what may be called a custodial interrogation commence, at about 6:30 a.m. It was at this time that the defendant was advised of her constitutional rights, and at about 7:20 a.m. that she made the inculpatory statement in question. We conclude that, under the totality of circumstances, the trial court had before it ample credible evidence from which to conclude that the statement at issue was made voluntarily and knowingly. *State* v. *Edwards* (1976), 49 Ohio St. 2d 31, 358 N.E.2d 1051, *vacated on other grounds* (1978), 438 U.S. 911, 98 S. Ct. 3147.

The second argument under the first assignment of error deals with whether or not defendant's constitutional right to counsel was violated. This argument consists of two points: first, the defendant claims she asked for the assistance of counsel during the interrogation process and was told she did not need it. This was flatly denied by the officers involved in the questioning. Some independent confirmation of the police position is supplied by the numerous telephone calls made by the defendant during the evening, none of which were to the counsel with whom she had conferred about estate matters earlier in the day, and who represented her interests.[2] In any event, a clear question of credibility was presented to the court, which

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[2] Is seems clear that the police were aware that defendant's counsel, William Stewart Mathews II, represented her in her presumed capacity as administratrix of her husband's estate, since Mathews had contacted the Sheriff's office during business hours on the 20th to inquire about the return of personal property of the deceased held by that office or the coroner. It is not contended that the authorities knew then that Mathews was to represent her in criminal charges, or that Mathews had instructed them not to question her; indeed, at that time the defendant was not under suspicion, and no reason for such pre-

it resolved against the defendant. We know of no reason why it was not within the power of the court to do so. *State* v. *DeHass* (1967), 10 Ohio St. 2d 230, 227 N.E. 2d 212.

The second aspect of this argument concerns a telephone call to the station made sometime on the morning of May 21st by the defendant's atorney. It is agreed that such a call was made and received, and that the attorney was told that interrogation of the defendant had already ceased because her statement had been completed. It is further agreed that the defendant's statement was completed at about 8:10 a.m. The problem arises from testimony adduced on behalf of the defendant that the call was made to the station shortly after 7:45 a.m., which would obviously have been before the statement had been completed and would, if accurate, raise the constitutional problem addressed in *Escobedo* v. *Illinois* (1964), 373 U.S. 478, 84 S.Ct. 1758, and *Edwards* v. *Arizona* (1981), 451 U.S. 477, 101 S. Ct. 1880. *See also State* v. *Burt*, C-790438 (1st Dist. May 14, 1980). An issue of fact was, however, presented to the trial court as to when this call was actually made. The officer who received the attorney's call, Captain Henke, the supervising officer in the investigation, testified quite positively that it was not made until *after* the defendant's statement had been completed, T.p. 172, which would necessarily place the call after 8:10 a.m.

The defendant argues that we are able to, and should, find the trial court's adverse resolution of this factual dis-

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cautions could have arisen. It was not until an early morning call to Mathews by the defendant's daughter, Mary Beth, that he was aware of his client's possible jeopardy on criminal charges.

pute to be contrary to the manifest weight of the evidence. This would require, obviously, that we discount Captain Henke's testimony on the timing of the call, and accept in its most favorable light that of Mathews, the defendant's attorney. He testified that he had received the call from Mary Beth Duerr alerting him that the defendant had been at the station all night at "approximately" 7:45 a.m. and that, after completing this call, he "immediately" called the station and spoke to Henke. T.p. 261, 262. It would also require that we discount the thrust of his testimony that the defendant returned his call at "approximately 8:10 or 8:15 a.m.," *after* she had finished her statement and the subsequent fingerprinting and photographing. T.p. 262, 267, 268. We find no justification, under these circumstances, for substituting our judgment on the issue for that of the trier of facts, and decline to do so.

The first assignment of error is accordingly overruled.

The defendant's second assignment of error argues that the trial court erred in overruling her objection to the introduction of her inculpatory statement into evidence where, it is insisted, there had been insufficient evidence of the *corpus delicti* first established. While the rule urged by the defendant, *viz.*, that some evidence of the death of the victim, and a criminal agency as the cause of that death, must precede the introduction of a confession by the defendant, is a correct one, *State* v. *Maranda* (1916), 94 Ohio St. 364, 114 N.E. 1038, it is equally clear that:

> The quantum or weight of such additional or extraneous evidence is not of itself required to be equal to proof beyond a reasonable doubt, nor even enough to make a *prima facie* case.

State v. *Edwards* (1976), 49 Ohio St. 2d 31, 358 N.E.2d

1051, syllabus 1c. As noted by Chief Justice O'Neill in *Edwards, supra* at 35-36, 358 N.E.2d at 1056.

> Considering the revolution in criminal law of the 1960s and the vast number of procedural safeguards protecting the due process rights of criminal defendants, the *corpus delicti* rule is supported by few practical or social-policy considerations. This court sees little reason to apply the rule with a dogmatic vengeance.
>
> In considering the minimal requirements of *Maranda* and in evaluating the evidence in the light of the ordinary customs of our times, we conclude that the prosecution did produce *some* evidence tending to corroborate the material elements (of the crime).

See also State v. *Black* (1978), 54 Ohio St. 304, 376 N.E. 2d 948. Here, the record reveals that substantially more than "some" evidence of the *corpus delicti* preceded the introduction of the inculpatory statement of the defendant. The first witness, a co-worker of the deceased, testified that Mr. Duerr was alive at shortly after 5:00 p.m. on May 19, having spoken to him about then. He further testified that he was told by the defendant the following morning that Mr. Duerr had been shot the preceding evening. He then verified photographic exhibits, subsequently received into evidence, one of which was a morgue photograph of the deceased clearly showing the bullet wound in the deceased's head. The second and third witnesses, neighbors of the Duerr's testified that on the evening of the 19th, the defendant told them that her husband had been shot. The second witness testified that the defendant told him she thought her husband was dead. The fourth witness, a paramedic, examined the body, found no respiration or heartbeat, and then described the trauma to the head of the deceased. The sixth witness,

Lt. Hulgin, examined the scene at 9:45 p.m. on the 19th, and described finding decedent's blood stained wearing apparel on the stairway, other blood stains on the bathroom doorjamb, a spent cartridge casing lying on the floor, and the body of the deceased in his bedroom. He further testified that he found a bullet hole in the bedroom wall, and blood on the blanket on the bed along with another spent cartridge casing. All of the foregoing testimony preceded the introduction of the statement of the defendant and was ample, we conclude, to establish the *corpus delicti* under the *Edwards* and *Black* rationale. *State* v. *Latscha,* C-800844 (1st Dist. Nov. 18, 1981). The second assignment of error is without merit and is overruled.

The third assignment of error is phrased as follows:

> The trial court erred to the substantial prejudice of the defendant-appellant by admitting into evidence statements of alleged co-conspirators without first establishing the conspiracy by independent proof, or were [*sic*] not made infurtherance of the conspiracy.

The reference in this assignment to "statements of alleged co-conspirators," it must be understood, does *not* refer to the formal taped confessions of Dennis Goerler and Catherine Duerr. Their confessions implicated the defendant in a conspiracy of the three to kill Raymond Duerr, and were taken during the early morning hours of May 21st. Both confessions preceded (and caused) the custodial interrogation of the defendant, resulting in her inculpatory statement, which ended at 8:10 a.m. These taped confessions of Goerler and Catherine Duerr were never offered or received into evidence, although referred to in passing, from time to time, primarily to establish the change in status of the defendant from mere witness to prime suspect, requiring as to her the full panoply of constitutional in-

structions. Rather, the assignment of error must be held to refer to various statements made to witnesses by Goerler or Catherine Duerr, or actions taken by both, but principally Goerler, generally prior to the homicide. These statements, too lengthy to set out in detail herein but which are explored on pp. 38-42 of the appellant's brief, were introduced into evidence *after* the court received into evidence the confession of the defendant. The defendant's position may fairly be summarized by the following statement of her argument:

> However, in the case at hand, the Court allowed statements made by alleged co-conspirators before a conspiracy had been established, before any independent proof had been offered concerning said conspiracy, and from a review of the record, it can be seen that the only evidence that a conspiracy ever existed or that the alleged co-conspirators and Defendant-appellant were involved, *was the hearsay statement of Defendant-Appellant,* which was admitted in the State's case in chief *and which is not independent proof required by the Rule and the case law previously cited* (emphasis added).

Appellant's Brief, pp. 38-39.

The "Rule" to which reference was made in the quotation above, and upon whose interpretation this aspect of the issue raised in the third assignment of error depends, is Evid. R. 801 (D) (2) (e), which provides:

> (D) *Statements Which Are not Hearsay.* A statement is not hearsay if: . . .
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . . (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy *upon independent proof of the conspiracy* (emphasis added).

Unless the inculpatory statement[3] of the defendant may be said to constitute "independent proof" of the conspiracy, the defendant is quite correct that the statements of the co-conspirators would not fall within Evid. R. 801 (D) (2) (e) and would thus be inadmissible hearsay, since no other proof of the conspiracy exists in the record. We simply disagree with the defendant that the statement of the defendant, which concededly gave substance to the charge of a conspiracy of the three, was not such "independent proof" of the conspiracy as would satisfy the requirements of the rule.

Thus, while the point appears to be one of first impression in Ohio, we are instructed by a variety of decisions interpreting the federal analogue of the Ohio rule, Fed. R. Evid. 801 (d) (2) (E). It will be noted that while the federal rule does not contain an explicit requirement that there be independent proof of the conspiracy, as found in the Ohio rule, the requirement of independent proof has nevertheless been engrafted onto the federal rule by case law interpreting the section. These cases follow the reasoning in *Glasser* v. *United States* (1941), 315 U.S. 60, 74, 75, 62 S. Ct. 457, 467, that without proof *aliunde* of the conspiracy, "hearsay would lift itself by its own boot straps to the level of competent evidence." One statement of the rule was made in the following fashion:

> Cambindo argues that the court admitted hearsay evidence that did not fall under the coconspirator exception to the hearsay rule, Fed. R. Evid. 801 (d) (2) (E), in that certain statements were admitted into evidence prior to a decision as to the declarant's status

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[3] This is improperly characterized by the defendant as "hearsay;" of course, it is not. Evid. R. 801(D)(2)(a) quite clearly excludes from hearsay those statements offered against a party consisting of his own statements.

> as a conspirator. The law is well settled in this circuit that declarations that are otherwise hearsay may nevertheless be provisionally admitted, subject to eventual connection of the defendant with the conspiracy alleged, as long as the trial court is ultimately satisfied that the participation of the defendant against whom the declaration is offered has been established by a fair preponderance of the evidence independent of the hearsay utterances. *United States* v. *De Fillipo,* 590 F. 2d 1228, 1235-36 (2d Cir. 1979) (following *United States* v. *Geaney,* 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied,* 397 U.S. 1028, 90 S. Ct. 1276, 25 L.Ed.2d 539 (1970)).

U.S. v. *Cambindo Valencia* (2nd Cir. 1979), 609 F.2d 603, 630. *See also U.S.* v. *Papia* (7th Cir. 1977), 560 F.2d 827; *U.S.* v. *Macklin* (8th Cir. 1978), 573 F.2d 1046; *U.S.* v. *James* (5th Cir. 1979), 590 F.2d 575; *U.S.* v. *Graham* (8th Cir. 1977), 548 F.2d 1302; *U.S.* v. *Williams* (8th Cir. 1976), 529 F.2d 557; *U.S.* v. *Sanders,* (8th Cir. 1972), 463 F.2d 1086. *See generally* M. Graham, *Handbook of Federal Evidence* § 801.25 (1981); 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 104 (05) (1982), where a review of the federal circuits holdings on the issue is listed at footnote 29.

We take it, therefore, that the Ohio rule, as expressed, and the federal rule, as interpreted, are substantially the same. It then becomes relevant to examine federal decisions dealing with the issue of whether a confession of conspiracy by a defendant will constitute evidence *aliunde,* or independent proof, sufficient to bottom out-of-court statements of co-conspirators. These authorities, we conclude, sustain the state's position that statements of the defendant probative of the existence of a conspiracy will suffice to furnish the independent proof of the conspiracy requisite under the rule. Thus, in *U.S.* v. *Gallagher* (7th

Cir. 1971), 437 F.2d 1191, the defendant argued that there was no evidence connecting him with his brother in a conspiracy to defraud, so that out of court statements of his brother and an unindicted co-conspirator could not properly have been used against him. The Court noted:

> The flaw in appellant's argument which makes it inapposite is that here the record discloses that there is independent evidence of appellant's connection with the conspiracy which serves to make the declarations of his brother . . . admissible against appellant.

Id. at 1193. The independent proof, noted the court, consisted of a number of inculpatory statements made by the appellant himself to various witnesses. Similarly, in *U.S.* v. *Cerone* (7th Cir. 1971), 452 F.2d 274, a case of conspiracy to use interstate facilities in aid of illegal gambling, the court framed the issues as follows:

> Finally in this regard, defendants argue that it was error to admit the testimony of Bombacino as to extrajudicial declarations and acts of the defendants absent prior independent proof of the existence, scope and membership of the conspiracy. It is axiomatic that such declarations and acts of a co-conspirator may not be admitted in evidence against a defendant absent independent evidence establishing his participation in the conspiracy. *E.g., Glasser* v. *United States,* 315 U.S. 60, 74-75, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Oltman* v. *Miller,* 407 F.2d 376, 378-379 (7th Cir. 1969); *United States* v. *Stadter,* 336 F.2d 326, 329 (2d Cir. 1964); *cf. Logan* v. *United States, supra,* at 144 U.S. 309, 12 S. Ct. 617. Defendants proceed from that well-established principle to assert that there was no such independent evidenced here, or, in the alternative, that if there was independent evidence it was insufficient to validate the admission of Bombacino's testimony.

Id. at 283. Rejecting this argument, the court noted that

although courts have admitted such evidence on a theory that the defendant's inculpatory statements constituted admissions against interest and hence were admissible in themselves,

> the better view is that such admissions are not hearsay at all and are admissible absent other reasons for exclusion. . . . As evidence independent of the hearsay statement of a co-conspirator, such admissions may quite properly constitute corroborative evidence sufficient to justify the admission of a co-conspirator's hearsay declarations.

Id. at 284.

In *U.S.* v. *Cirillo* (2nd Cir. 1974), 499 F.2d 872, the court concluded that the non-hearsay evidence of a conspiracy, the principal item of which was a "devastatingly incriminatory telephone conversation" with the defendant, *id.* at 884, was sufficient to admit hearsay statements of co-conspirators. In *U.S.* v. *Rodriguez* (5th Cir. 1975), 509 F.2d 1342, the rule is encapsulated in the following extract:

> Appellant first contends that extrajudicial statements made by co-defendants Castro, Arteaga, and Yepez, outside the presence of the appellant were improperly admitted into evidence. We hold that these statements, although hearsay, were properly admitted as declarations of co-conspirators made during the course of the conspiracy and in furtherance of it.
>
> Of course, the government must introduce sufficient independant [sic] evidence of the existence of a conspiracy and of appellant's participation therein before the judge may allow declarations of the co-conspirator, made outside of the presence of the defendant, to go to the jury. *United States* v. *Apollo,* 476 F.2d 156, 157 (5th Cir. 1973); *Montford* v. *United States,* 200 F.2d 759, 760 (5th Cir. 1952). The test of sufficiency is whether the other evidence, *aliunde* the hearsay,

> would be sufficient to support a finding that the defendant himself is a conspirator – that is, whether the government has established a prima facie case of the existence of a conspiracy and of defendant's participation therein. *United States* v. *Oliva*, 497 F.2d 130, 132-33 (5th Cir. 1974).
>
> The trial judge properly required that the government show the appellant's participation in the conspiracy by evidence other than hearsay before allowing the jury to hear any of the extrajudicial statements of the co-conspirators. *The government met this burden by having Agent Scrocca describe the July 16, 1971 meeting with Rodriguez (i.e., the defendant). The judge then held that the government had made a sufficient showing that Rodriguez was a member of the conspiracy.* We believe the judge's ruling that sufficient evidence of a conspiracy and of defendant's participation therein had been presented was correct (emphasis added).

Id. at 1346.

We conclude from these authorities, as well as from the logic of the problem, that the non-hearsay admissions against interest of the defendant may be considered as establishing the "independent proof" of the conspiracy necessary to satisfy the requirements of Evid. R. 801 (D) (2) (e), removing from hearsay disabilities the statements of co-conspirators made during the course and in furtherance of a conspiracy. What, after all, is more persuasive or reliable evidence of the existence of a conspiracy than the admission by the defendant, freely and voluntarily given, that such conspiracy did in fact exist and included her among its members?

Finally, the defendant argues under her third assignment of error, that since at least some of the statements of the co-conspirators were made after the conspiracy had

arguably terminated, they were not made "during the course and in furtherance of the conspiracy" within the meaning of Evid. R. 801 (D) (2) (e).[4] This argument was, however, addressed by the Supreme Court in *State* v. *Shelton* (1977), 51 Ohio St. 2d 68, 364 N.E.2d 1152, *vacated on other grounds* (1978), 438 U.S. 909, 98 S. Ct. 3133, where the syllabus holds:

1. A conspiracy to commit a crime does not necessarily end with the commission of the crime.

2. A declaration of a conspirator, made subsequent to the actual commission of the crime, may be admissible against any co-conspirator if it was made while the conspirators were still concerned with the concealment of their criminal conduct or their identity.

We find this statement of the law necessarily dispositive of all of the instances of statements by co-conspirators cited by the defendant, at least up to the point where each of the two co-conspirators made their formal taped confessions approximately a day and one-half after the homicide.[5] Until that point, both Goerler and Catherine Duerr were still obviously concerned with the concealment of their criminal conduct. All such statements, which include nearly all of those instanced to us by the defendant, were therefore

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[4] The defendant also argues that the *crime* of conspiracy terminates when its objects are committed. R.C. 2923.01. This is offered to supplement the thrust of the above quoted language of Evid. R. 801(D)(2)(e), but has, in fact, no bearing on the instant issue. The defendant was not indicted for the specific crime of "conspiracy" as defined in R.C. 2923.01, nor tried under its provisions. The question, rather, involves the common law concepts of conspiracy as that word is used in the evidence rules in question.

[5] *But see* P. Giannelli, *Ohio Evidence Manual* § 801.15 at 15-16 (1982), for contrasting federal rule.

either made during the course and in furtherance of the conspiracy, or were made while the conspirators were still concerned with concealment of their criminal conduct.

The only "statements" of the co-conspirators cited to us by the defendant that might arguably lie beyond the obvious scope of *Shelton* occurred during the rebuttal testimony of Lt. Hulgin. A review of the record reveals that the following was the extent of that testimony:

Q. Officer, would you again state your name and spell your last name?

A. My name is Raymond Hulgin, H-u-l-g-i-n.

Q. And you were previously sworn in this same cause, officer, if you remember.

Officer, directing your attention again to the evening of May 20 and early morning hours of May 21, 1981, did you have an occasion to take a statement from Dennis Goerler?

A. Yes, sir, I did.

Q. And at any point did you advise, Mr. Goerler of his constitutional and Miranda rights?

A. Yes, I did.

Q. And when did you take a statement from him in relation to that fact?

A. In relation to advising him of his rights?

Q. Yes.

A. His statement was taken immediately following the advice of his rights.

Q. What happened after that statement was concluded?

A. Dennis Goerler was placed under arrest and charged with aggravated murder.

Q. And what happened to him physically after being placed under arrest?

A. He was processed as a prisoner; that is, he was fingerprinted and photographed and the necessary paperwork was made out concerning the charges placed against him.

Q. Did he remain in the custody of the Hamilton County sheriff at that time?

A. Yes, he did.

Q. And does he so remain even until today?

A. Yes, he is.

MR MOOREHEAD: Thank you very much, officer. No further questions.

T.p. 62-622.[6]

It is immediately apparent that no "statement" of the co-conspirator, Goerler, was introduced or attempted, merely the *fact* of its having been taken, a fact which required precedent *Miranda* warnings and occasioned his subsequent arrest and detainment. The defendant argues that the jury may well have drawn invidious conclusions from this recitation, but that is not to argue that the testimony of Lt. Hulgin was inadmissible under Evid. R. 801 (D) (2) (e), the challenge posed by the assignment of error. It was not so inadmissible; the testimony does not relate an out-of-court statement at all.

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[6] We find no specific objection to this testimony in the record. There was considerable argument centering on Evid. R. 801(D)(2)(e) in connection with a Rule 29 motion at the conclusion of the state's case, renewed at the end of all the evidence, but no attempt to relate the above rebuttal testimony directly to that argument.

The defendant's third assignment of error is overruled, and the judgment of the trial court is affirmed.

DOAN and KLUSMEIER, JJ., CONCUR.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Opinion.